

IN THE SUPREME COURT OF MISSISSIPPI

NO. 2011-CT-01459-SCT

JOHNNY RAY SIMS a/k/a JOHNNY R. SIMS

v.

STATE OF MISSISSIPPI

ON WRIT OF CERTIORARI

DATE OF JUDGMENT: 04/16/2009
TRIAL JUDGE: HON. PRENTISS GREENE HARRELL
TRIAL COURT ATTORNEYS: MICHAEL KUYKENDALL
LAUREN BARNES
COURT FROM WHICH APPEALED: MARION COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT: JOHNNY RAY SIMS (PRO SE)
ATTORNEY FOR APPELLEE: OFFICE OF THE ATTORNEY GENERAL
BY: LAURA H. TEDDER
NATURE OF THE CASE: CIVIL - POST-CONVICTION RELIEF
DISPOSITION: AFFIRMED - 03/20/2014
MOTION FOR REHEARING FILED:
MANDATE ISSUED:

EN BANC.

LAMAR, JUSTICE, FOR THE COURT:

¶1. In a multi-count indictment, Johnny Ray Sims was charged with three counts of aggravated assault, with each count alleging a separate victim. The trial court subsequently accepted the defendant's best-interest guilty plea to one count of aggravated assault and dismissed the remaining counts. As part of his sentence, Sims was ordered to pay restitution to an alleged victim named in one of the dismissed counts. More than three years later, Sims filed a petition for post-conviction relief, raising a claim of illegal sentence, among several

other claims. The trial court dismissed Sims’s petition as time-barred and successive, and the Court of Appeals affirmed the dismissal.¹ We granted Sims’s petition for writ of certiorari to review his claim that restitution related to a dismissed charged was improper.

FACTS

On September 13, 2003, Sergeant Pearlie Hendricks saw Sims’s vehicle outside an AutoZone store in Columbia, Mississippi. Sergeant Hendricks knew Sims and believed he had warrants for his arrest. She contacted dispatch to confirm that the warrants were active, and they were. Sims’s girlfriend, Angelina Robinson, was a passenger in the vehicle. When Sergeant Hendricks approached the vehicle, she asked Robinson to open the door. Robinson complied. Sergeant Hendricks tried to speak to Sims through the opening, but Sims told Robinson to close the door. He then drove off at a high rate of speed with police officers in pursuit.

During the pursuit, Sims ran a red light and collided with a vehicle driven by Mary Beth Broome. Sims continued to drive, striking a second vehicle driven by Virgie Stevens. Sims’s vehicle then struck a tree, injuring Robinson. Sims exited the vehicle and fled on foot.²

¶2. Based on these events, Sims was indicted on three separate counts of aggravated assault: Count I for injuries to Virgie Stevens (driver of the second car), Count II for injuries to Angelina Robinson (Sims’s passenger), and Count III for injuries to Mary Beth Broome (driver of the first car).

¶3. Sims entered a “best interest” or *Alford* plea to the count of aggravated assault that pertained to Mary Beth Broome.³ Upon recommendation of the State, the trial court

¹*Sims v. State*, ___ So. 3d ___, 2013 WL 791849, *4 (Miss. Ct. App. Mar. 5, 2013).

²*Sims*, 2013 WL 791849, at *1.

³See *North Carolina v. Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970) (under a “best interest plea,” the accused “may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime.”).

dismissed the two remaining counts of aggravated assault, but ordered Sims to pay restitution to Mary Beth Broome and Virgie Stevens. Sims was ordered to pay \$4,000 to Broome and \$6,000 to Stevens.

¶4. Sims petitioned for post-conviction relief in the trial court, and his petition was dismissed as time-barred and successive. Addressing the merits, the Court of Appeals affirmed the dismissal and rejected Sims’s argument that restitution to Stevens was an illegal punishment.

STANDARD OF REVIEW

¶5. To succeed on appeal from a trial court’s dismissal of a motion for post-conviction relief, the defendant must demonstrate that the trial court’s decision was “clearly erroneous.”⁴

When questions of law are raised, the appellate court will examine such issues *de novo*.⁵

DISCUSSION

¶6. In this case, the trial court dismissed Sims’s petition as time-barred, applying the three-year statute of limitations found in Mississippi Code Section 99-39-5(2). Sims claims that the trial court could not legally order him to pay restitution to the alleged victim of a crime for which he was not convicted. As this Court has recognized, an illegal punishment is an exception to post-conviction procedural bars.⁶ Therefore, we will address the merits of Sims’s petition.

⁴*Brown v. State*, 731 So. 2d 595, 598 (Miss. 1999).

⁵*Id.*

⁶*Rowland v. State*, 98 So. 3d 1032, 1036 (Miss. 2012); *see also* Miss. Code Ann. § 99-39-5(1)(a) (Rev. 2007) (providing an exception for illegal sentences)).

¶7. The restitution statute provides that “[w]hen a person is convicted of criminal activities which have resulted in pecuniary damages, in addition to any other sentence it may impose, the court may order that the defendant make restitution to the victim.”⁷ Prior to accepting his plea of guilty, the trial judge asked the prosecutor to state for the record the facts the State could prove if the case went to trial. The State’s offer of proof at the plea hearing established that Sims struck two vehicles and crashed his car into a tree during a high-speed chase he initiated in an attempt to flee law-enforcement officers. As a result of the collisions, three women were injured and incurred medical expenses. Following the State’s recitation of the facts, the court said “then, Johnny Ray Sims, before I accept your plea, is there anything you want to change about what we’ve gone over?” Sims replied, “No, sir.” As such, it was undisputed that three people suffered pecuniary damages as a result of Sims’s criminal activities. The trial court was well within its discretion to impose restitution

⁷Miss. Code Ann. § 99-37-3 (Rev. 2007). The restitution statute includes the following definitions:

“Criminal activities” shall mean any offense with respect to which the defendant is convicted or any other criminal conduct admitted by the defendant.

Miss. Code Ann. § 99-37-1(a).

“Restitution” shall mean full, partial or nominal payment of pecuniary damages to a victim.

Miss. Code Ann. § 99-37-3(1)(c).

“Victim” shall mean any person whom the court determines has suffered pecuniary damages as a result of the defendant’s criminal activities.

Miss. Code Ann. § 99-37-3(1)(d).

for the benefit of any victim “whom the court determines . . . suffered pecuniary damages as a result of the defendant’s criminal activities.”⁸

¶8. Sims pleaded guilty to the charge of aggravated assault against Broome and was ordered to pay restitution to Broome and Stevens. In exchange, the State agreed to dismiss the charges of aggravated assault against Stevens and Robinson. Sims argues that ordering him to pay restitution to Stevens without a corresponding aggravated-assault conviction constituted a legally void punishment to which Sims could not agree. We disagree.

¶9. Our caselaw is abundantly clear that a defendant can forego rights – even constitutional rights – in order to avoid more severe punishment.⁹ This Court in the *Butler* decision found that:

Although the authority to impose restitution flows from the adjudication of guilt or the defendant’s plea of guilty, that is not to say that restitution may not be imposed at any stage of the criminal process through informal, government-sanctioned compromises and settlements between offender and victim so long as detention is not used to induce an agreement.¹⁰

Sims was ably represented and advised of his constitutional rights when he stood before the Court and entered a plea of guilty. Paragraph 11 of Sims’s sworn plea petition states:

I declare that no officer or agent of any branch of government (Federal, State or Local) has made any promise or suggestion of any kind to me, or within my

⁸Miss. Code Ann. § 99-37-3(1)(d).

⁹See *Twillie v. State*, 892 So. 2d 187 (Miss. 2004). In *Twillie*, the defendant moved to withdraw his guilty plea to life without the possibility of parole, alleging it “was an impermissible ex post facto application of the law.” *Id.* at 188. The trial court denied Twillie’s motion and Twillie appealed. *Id.* This Court affirmed the denial, finding Twillie had knowingly and intelligently waived his *ex post facto* claim based on the transcript of his plea-hearing testimony. *Id.* at 191.

¹⁰*Butler v. State*, 544 So. 2d 816, 821 (Miss. 1989).

knowledge to anyone else, that I will receive a lighter sentence, or probation, or any other form of leniency if I plead “GUILTY”, except: Drop 2 Counts of Aggravated Assault.

So in exchange for his plea of guilty, two aggravated-assault charges against Sims were dismissed. We find Sims waived any objection to the restitution order. The restitution statute states that “[i]f the defendant objects to the *imposition, amount, or distribution* of restitution the court shall, at the time of sentencing, allow him to be heard on such issue.”¹¹ But if the defendant fails to object at the time of sentencing, he waives any objection to the imposition, amount, or distribution of restitution.¹² Neither Sims nor his attorney ever objected – either at the plea hearing or two weeks later at the sentencing hearing – to the imposition of the restitution or the amount or the distribution of the restitution ordered. Sims should not now be allowed to complain.¹³ For these reasons, we affirm the trial court’s dismissal of Sims’s petition for post-conviction relief and the Court of Appeals’ affirmance thereof.

¶10. **AFFIRMED.**

**WALLER, C.J., RANDOLPH, P.J., PIERCE AND COLEMAN, JJ., CONCUR.
KITCHENS, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY
DICKINSON, P.J., CHANDLER AND KING, JJ.**

KITCHENS, JUSTICE, DISSENTING:

¹¹Miss. Code Ann. § 99-37-3(3) (Rev. 2007).

¹²*Shook v. State*, 552 So. 2d 841, 851 (Miss. 1989); *see also Harris*, 757 So. 2d at 199, and *Powell v. State*, 536 So. 2d 13, 17 (Miss. 1988).

¹³*Shook*, 552 So. 2d at 851.

¶11. I respectfully dissent. Sims was convicted only of the assault of Mary Beth Broome. Virgie Stevens was not a victim of Sims’s assault upon Mary Beth Broome, and thus I find that the imposition of restitution for Stevens within the sentencing process for a crime committed against Broome constitutes an illegal punishment.

¶12. The majority recounts that, “[f]ollowing the State’s recitation of the facts, the court said, ‘then, Johnny Ray Sims, before I accept your plea, is there anything you want to change about what we’ve gone over?’ Sims replied, ‘No, sir.’” Based on the cited colloquy, the majority opines that, “it was undisputed that three people suffered pecuniary damages as a result of Sims’s criminal activities.” Under Mississippi Code Section 99-37-3, which defines “criminal conduct” for the purposes of the restitution statute, the majority implies that Sims admitted criminal conduct resulting in pecuniary loss to all three victims, since he interposed no objection to the State’s recitation of the facts. But the State never made “an offer of proof . . . before the court and the defendant at the plea hearing” that “three women were injured and incurred medical expenses” as a result of Sims’s conduct, as the majority posits. The majority is correct that the State offered proof “that Sims struck two vehicles and crashed his car into a tree during a high-speed chase he initiated in an attempt to flee law-enforcement officers.” But the State mentioned only one victim, Broome: “Through medical testimony, the State would expect to prove that Mary Beth Broome’s vehicle was struck by Mr. Sims’[s] vehicle, and that crash caused her to have cervical disk displacement.” No offer of proof was made with regard to any injuries and medical expenses incurred by Stevens or Angelina Robinson, Sims’s passenger. Respectfully, the majority’s conclusion that Sims admitted causing pecuniary harm to all three victims does not follow from the record.

¶13. Further, *before* the underlying facts of the case were read to the court by the prosecutor, the following exchange occurred:

Judge: You're ready, then, to enter your plea?

Sims: Yes, sir.

Sims's Attorney: Your Honor, I'd just like to bring to the court's attention this is a plea in his best interest.

Judge: Okay. I don't need to have *the charge* formally read to you, then?

Sims: No, Sir.

Judge: You understand what *it* is?

Sims: Yes, Sir.

Judge: It's *a charge* of aggravated assault. And to *that charge*, Johnny Ray Sims, how do you plead?

Sims: Guilty.

(Emphasis added.) The judge clearly indicated during the plea colloquy that Sims was pleading guilty to a single charge of aggravated assault. Later, however, *after* reciting the factual basis for the charge, the prosecutor stated, “for the record, the State agrees, upon acceptance of his guilty plea in Count Three, the *State* agrees to dismiss Counts One and Two, but asks that restitution be considered for all three counts.” (Emphasis added.) This is the first point in the record at which the State expressed its intention to seek restitution for all three individuals named in the three original counts of the indictment, and there is nothing to show that Sims was aware of the State's objective prior to its post-plea announcement.

¶14. The majority correctly observes that “a defendant can forego rights—even constitutional rights—in order to avoid more severe punishment.” This presupposes, however, that Sims actually *agreed* to plead guilty to the aggravated assault upon Broome *and* to pay restitution to Broome and Stevens. According to the majority, “Sims pleaded guilty to the charge of aggravated assault against Broome *and was ordered to pay restitution to Broome and Stevens. In exchange*, the State agreed to dismiss the charges of aggravated assault against Stevens and Robinson.” (Emphasis added.) The Court of Appeals articulated a similar analysis: “it seems obvious that Sims had a plea agreement or, at the least, an understanding, that if he pleaded guilty to one of the aggravated-assault counts, the State would dismiss the other two counts upon Sims’s agreement that he would pay restitution to all the victims.” *Sims v. State*, 2013 WL 791849, at *9 (Miss. Ct. App. Mar. 5, 2013). I do not disagree with the majority that “in exchange for his plea of guilty, two aggravated-assault charges against Sims were dismissed.” But the record is entirely devoid of any agreement, oral or written, between Sims and the State regarding payment of restitution in exchange for a guilty plea, and we decline to take the speculative leaps necessary to such a finding.

¶15. The majority cites *Butler v. State*, 544 So. 2d 816, 821 (Miss. 1989), for the proposition that restitution may “be imposed at any stage of the criminal process through informal, government-sanctioned compromises and settlements between offender and victim so long as detention is not used to induce an agreement.” In *Butler*, however, the defendant was convicted of one count of manslaughter, his prison sentence was suspended, and he was placed on probation. As a condition of his probation, Butler was ordered to make monthly payments to the minor child of the victim as “child support.” *Id.* On appeal, the defendant

challenged the payments, arguing that they were outside the scope of Mississippi Code Section 99-37-1. *Id.*

¶16. Examining the statutory language, the *Butler* Court recognized that “it appears that the payment of restitution is not limited only to the person that has been directly injured by a guilty party; the payment of restitution can also be extended to members of the victim’s family who suffer pecuniary damages.” *Id.* at 821. This Court also determined that lost child support was a “type of special damages that is encompassed under the [restitution] statute.” *Id.* at 823. However, the Court ultimately reversed and voided the support aspect of the court-ordered restitution, because it never had been established that the victim was the child’s biological father. *Id.* Because the child was born during the mother’s marriage to another man, her husband was the presumed father, not the victim. *Id.* (“The presumption that a child born in wedlock is the legitimate child of the husband is one of the strongest presumptions known to law and may be overcome only by proof beyond a reasonable doubt that the husband is not the father.”) (citations omitted). The Court found that the child of the victim was not “a legally eligible recipient,” because, without the paternity of the decedent having been judicially established in a paternity hearing, the legal presumption of paternity remained in effect. *Id.*

¶17. The case before us is readily distinguished from *Butler* since, in that case, the defendant’s criminal act would have deprived the victim’s minor child of financial support, if, indeed, paternity had been established. Unlike *Butler*, any pecuniary damage suffered by Stevens was not a consequence of Broome’s injuries. Stevens’s injuries were neither directly nor indirectly tied to Broome’s status as a victim of the crime for which Sims was convicted.

¶18. Even though all of the original counts may have arisen from the same high-speed chase and allegedly involved the same perpetrator, each count constituted an independent, stand-alone charge. The rules adopted by this Court authorizing the use of multiple count indictments clearly contemplate distinct charges. URCCC 7.07(A) (“Two (2) or more offenses which are triable in the same court may be charged in the same indictment with a *separate* count for each offense”) (emphasis added). The rule also requires “a *separate* verdict for each count,” and “[w]hen a defendant is convicted of two (2) or more offenses charged in separate counts of an indictment, the court shall impose *separate* sentences for each such conviction.” URCCC 7.07(C), (D) (emphasis added). Because each count of aggravated assault specified only one victim, Virgie Stevens cannot be a victim of the count of aggravated assault that applied to Mary Beth Broome, absent some relevant familial relationship between the two. *See Butler*, 544 So. 2d 816 (parent and child).

¶19. Further, notwithstanding the conclusion of the majority and the Court of Appeals below that Sims had agreed that the State’s offer to dismiss two of the aggravated assault charges included his paying restitution to all of the victims, a defendant cannot agree to a legally void punishment. The trial judge was without authority to assess Sims with Stevens’s pecuniary damages. The count of aggravated assault against Stevens was dismissed at the instance of the State. Therefore, the court’s ordering Sims to pay restitution to Stevens constituted punishment for a crime of which he was not convicted, and, at the point at which the restitution to Stevens was ordered, with which Sims was not charged. Clearly, the punishment exceeded that authorized by the legislature. *See, e.g., Nichols v. State*, 826 So. 2d 1288, 1291 (Miss. 2002) (“[S]entencing is within the complete discretion of the trial court

and not subject to appellate review if it is *within the limits prescribed by statute.*”) (emphasis added). See also **Butler**, 544 So. 2d at 823 (holding that, despite the defendant’s acceptance of restitution as a condition of probation, the provision ordering payments was void because the recipient was not “legally eligible”). Thus, I find that the imposition of restitution to Stevens is void as an illegal punishment.

¶20. Finally, the majority echoes the argument of the Court of Appeals, citing **Shook v. State**, 552 So. 2d 841, 851 (Miss. 1989), that “Sims should not now be allowed to complain,” since neither he nor his trial attorney objected to the imposition or amount of restitution. But Shook was ordered to pay restitution after having been convicted and sentenced “on one count of aggravated assault and of shooting into an occupied dwelling.” *Id.* at 843. Here, the trial court ordered that Sims pay restitution for the count of aggravated assault to which he pled guilty, *and* the trial court ordered that Sims pay restitution for one of the two counts of aggravated assault which the trial court had dismissed. Thus, **Shook** is distinguishable. Likewise, the majority cites **Harris v. State**, 757 So. 2d 195, 100 (Miss. 2000). However, at issue in **Harris** was the *amount* of restitution rather than the legality of the ordered restitution. This Court stated “that by failing to object at sentencing to imposition of a *specified amount* for restitution for the victim[,] [defendant] waived this issue on appeal.” *Id.* (emphasis added) (citing **Powell v. State**, 536 So. 2d. 13, 17 (Miss. 1998)). **Harris** is distinguishable from the present case because the question before us is the legality of the restitution rather than its specified amount.

¶21. Because Sims was convicted only of the assault of Mary Beth Broome, I would hold that court-ordered restitution to Stevens exceeded the bounds of Mississippi Code Section

99-37-1, and I would reverse the Marion County Circuit Court's dismissal of Sims's petition for post-conviction relief, as well as the Court of Appeals' affirmance of that dismissal. I therefore respectfully dissent.

DICKINSON, P.J., CHANDLER AND KING, JJ., JOIN THIS OPINION.